**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| JIM HARD, CATHY HACKETT AND IRMA REVELES,<br><br>Charging Parties,<br><br>v.<br><br>CALIFORNIA STATE EMPLOYEES ASSOCIATION,<br><br>Respondent. | ) | Case No. SA-CO-208-S<br><br>PERB Decision No. 1368-S<br><br>December 21, 1999 |
| LYDIA RAMIREZ,<br><br>Charging Party,<br><br>v.<br><br>CALIFORNIA STATE EMPLOYEES ASSOCIATION,<br><br>Respondent. | ) | Case No. SA-CO-200-S |
| JOYCE FOX,<br><br>Charging Party,<br><br>v.<br><br>CALIFORNIA STATE EMPLOYEES ASSOCIATION,<br><br>Respondent. | ) | Case No. SA-CO-203-S |

Appearances: Cathy Hackett for Jim Hard, Cathy Hackett, Irma Reveles, Lydia Ramirez and Joyce Fox; Michael P. White, Attorney, for California State Employees Association.

Before Caffrey, Chairman; Dyer and Amador, Members.

## DECISION

AMADOR, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by

Cathy Hackett (Hackett) to a proposed decision by a PERB administrative law judge (ALJ). In the proposed decision, the ALJ considered three consolidated cases: Case No. SA-CO-200-S; Case No. SA-CO-203-S; and Case No. SA-CO-208-S. The ALJ dismissed the three cases, concluding that the California State Employees Association (CSEA or Association) did not violate the Ralph C. Dills Act (Dills Act) section 3519.S(b).[1]

PROCEDURAL HISTORY

These consolidated cases arise from CSEA's effort to prohibit internal union political activities by CSEA employees who take a temporary leave of absence from the State of California (State) to work for CSEA as organizers. In two of the cases it is alleged that the State employees who became temporary CSEA employees were terminated in retaliation for their political activities within CSEA. In the third case, the alleged unlawful conduct came in the form of a requirement that CSEA employees agree in writing to refrain from internal CSEA political activity as a condition of securing temporary employment with CSEA. It is

[1]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3519.5 states, in part, that:

> It shall be unlawful for an employee organization to:
>
> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

alleged that CSEA, by this conduct, interfered with protected rights and discriminated against those employees for their exercise of protected conduct.

In response, CSEA contends the individuals are not State employees and thus PERB has no jurisdiction over these charges. Alternatively, CSEA argues that its prohibition against political activity was reasonable and did not interfere with protected rights or discriminate against employees for their protected conduct.

## BACKGROUND

Lydia Ramirez (Ramirez) filed the unfair practice charge in Case No. SA-CO-200-S against CSEA on October 16, 1997. Joyce Fox (Fox) filed the unfair practice charge in Case No. SA-CO-203-S against CSEA on October 29, 1997. These charges allege that CSEA terminated Ramirez and Fox from their temporary positions with CSEA, in retaliation for their protected activities.

The PERB General Counsel's Office issued complaints in these companion cases on March 19, 1998. Specifically, the complaints allege that Ramirez and Fox engaged in protected activities in support of a group seeking to reform CSEA, and that CSEA terminated their temporary employment because they engaged in that conduct, in violation of the Dills Act.

Jim Hard (Hard), Hackett and Irma Reveles (Reveles) filed the unfair practice charge against CSEA in Case No. SA-CO-208-S on March 31, 1998. The PERB General Counsel's Office issued a complaint on May 11, 1998. As amended at the hearing, the

complaint alleges that the charging parties engaged in protected activities in support of a reform movement within CSEA, and CSEA later imposed a requirement that employees who take a leave of absence from State service to accept a temporary position with CSEA agree in writing that they will not engage in internal union political activity. The complaint alleges that CSEA took this action in retaliation for charging parties' protected activities on behalf of the reform group and that the requirement interferes with protected conduct, in violation of Dills Act section 3519.5(b).[2]

## FINDINGS OF FACT

Historically, there have been two types of leave available to State employees who leave State service temporarily to work for CSEA: union leave and so-called "lost time." Union leave typically was granted under memoranda of understanding (MOU) between CSEA and the State. An employee on union leave continued to receive pay and benefits from the State, and CSEA reimbursed the State. With the expiration of MOUs between CSEA and the State in 1995, union leave was discontinued and leave of absence from the State on "lost time" became the primary vehicle available to employees who elected to work for CSEA on a temporary basis. Employees on leave of absence retain a

[2]At the hearing, charging parties withdrew allegations concerning a series of allegedly unlawful CSEA actions affecting internal union realignments and elections. The allegations were withdrawn on the heels of a superior court decision addressing the same subjects. (See Hard, et al. v. California State Employees Association. Superior Court of California, County of Sacramento, Case No. 98CS01045.)

mandatory right of return to their State jobs upon completion of the approved leave. During the lost time appointment, these employees are paid directly by CSEA; hence the term lost time. "Lost timers" remain CSEA members and continue to pay dues.

CSEA's Civil Service Division (CSD) Policy File, section 11CSD3.04, provides:

> An employee serving in a lost-time capacity shall be restricted from Association politics in the same manner as the headquarters staff. Members on lost-time status shall not violate the written terms of any agreement between CSEA and the exclusive bargaining agent of CSEA staff.

In addition, CSD Policy File, section 11CSD3.00, provides that "lost time is for the purpose of performing work within the normal range of duties of staff."

Employees who accept a lost time appointment perform a variety of tasks for CSEA, including setting up meetings, coordinating phone banks, distributing literature, organizing rallies, and participating in membership drives. By comparison, labor relations representatives (LRRs) who usually hold permanent staff positions with CSEA have a primary responsibility for representational duties.[3] However, it is not uncommon for the duties of LRRs and lost timers to overlap: LRRs sometimes perform organizational activities and lost timers occasionally engage in representational activities of a minor nature.

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[3]CSEA LRRs are represented on an exclusive basis by the United Automobile Workers (UAW).

On August 16, 1996, then CSEA General Manager, Robert Zenz (Zenz) issued a memo to "All CSEA Staff and Lost Timers" with the subject "Involvement in Association Politics." Zenz reminded CSEA staff that "their involvement in Association politics is prohibited by long standing practice and by the terms of the UAW/CSEA agreement." Specifically, Zenz wrote:

> 1. No staff employee may render any service related to the selection of a particular member for an elective Association office, without regard to whether such service is on CSEA time or the employee's own time; whether compensated or uncompensated.
>
> 2. No staff employee may directly or indirectly use or promise to use any authority or influence to secure for any member an elective Association office.
>
> 3. No staff employee shall make any contribution of money or anything of value for the support of any candidate for CSEA office.

Regarding lost timers, Zenz wrote:

> All lost timers are also reminded that involvement in Association politics during working hours is a misuse of Association money and may be cause for corrective action up to and including early termination of the lost time appointment.

Hence, the prohibition against staff and lost timer involvement in Association politics preceded the instant charges.

Charging parties in these consolidated cases are supporters of Caucus for a Democratic Union (CDU). Hard has been the director of the CSD since October 1996, and he is the former statewide coordinator of CDU. According to Hard, CDU is trying to make structural changes within CSEA. Adrienne Suffin

(Suffin), a CSEA member who works for the Employment Development Department (EDD) and is the statewide coordinator of CDU described CDU as a "reform movement" within CSEA that is working to change the union. Hackett is the CSD deputy director of finance and a long time CDU activist, as are charging parties Fox, Ramirez and Reveles.

Ramirez had been terminated from her State position with the State Teachers Retirement System (STRS) and was unemployed at the time she was hired by Hackett as a lost timer. Ramirez filed three unfair practice charges, claiming that her termination was in retaliation for her protected union activities. At the time of the hearing in this matter, Ramirez's appeal of her termination was pending.

Ramirez worked 28-40 hours per week as a lost timer from July 1997 until her termination by CSEA in November 1997. As a lost timer, she performed organizing duties such as phone-banking and distributing leaflets. Most of her work was related to CSEA's campaign to secure new collective bargaining agreements with the State. However, Ramirez also worked for CSEA on the "Save the Dream" project, which included participation by national leaders and culminated with a rally on October 27, 1997, for better jobs, education, health care and equal opportunity. While she was a lost timer, Ramirez also attended CDU meetings, recruited CDU members, distributed literature on behalf of CDU, wore CDU T-shirts and protested on behalf of CDU at CSEA board of directors meetings.

Fox is a CSEA member and the Sacramento coordinator of CDU. She was hired by Hackett as a lost timer at the time she was an office technician in the Department of Consumer Affairs. Fox worked as a lost timer on a full-time and part-time basis from February 1997 until she was terminated by CSEA in October 1997.

As a lost timer, Fox focused on the CSEA campaign for new collective bargaining agreements. Phone banking was her main assignment, including calling employees to encourage them to become involved in CSEA, attend rallies, and recruit members. During her tenure as a lost timer, Fox also participated in events that involved CDU. At a May 14, 1997, lunch time rally for State employees at the Department of Personnel Administration (DPA), Fox distributed CDU literature advocating the reform of CSEA. She engaged in similar conduct at a State Capitol rally on June 27, 1997, while wearing a CDU T-shirt. At a CSEA meeting during the weekend of September 27, 1997, Fox arrived wearing a CDU T-shirt and button. She tried to gain entry to the meeting, but was told that it was an executive session and was not admitted. Eventually, she was escorted away by security. During the discussion, Fox testified, CSEA officials made negative remarks about CDU. At a CSEA executive board meeting on the weekend of October 5-6, 1997, Fox, Ramirez, and other CDU activists distributed CDU literature and buttons.

These CDU activities occurred either during a lunch hour, an evening, or on a weekend. Thus, Fox was of the opinion that her participation was on her own time, not that of CSEA. She said

her schedule as a lost timer was flexible and she was permitted to satisfy her eight hour per day commitment by working into the evening on days she spent participating in CDU activities during the day.

The duties of Ramirez and Fox are typical of those performed by others who held similar positions. For example, while on leave of absence from her job at EDD, Suffin worked as an organizer for CSEA. She received training from CSEA and the Service Employees International Union, the union with which CSEA is affiliated. One of the main issues around which Suffin's organizing took place was CSEA's effort to secure new contracts with the State. She said she tried to recruit leaders at work sites, held union meetings and distributed flyers. Suffin's testimony suggests there was some overlap between her duties and those of a LRR. As noted earlier, CSEA LRRs have the primary responsibility for representational functions. However, Suffin said she has counselled employees in a representational capacity before referring them to a CSEA LRR. And CSEA LRRs on occasion participated in identifying appropriate work sites to organize and provided lists of employees to contact. Such assignments usually are left to lost timers.

LRRs also have attended meetings that Suffin set up at work sites. According to Suffin, CSEA LRR, John Long was reassigned from his LRR position to work as an organizer during the contract campaign. And CSEA LRR, Anna Kammerer testified that six or

seven LRRs were reassigned to work with lost timers on the contract campaign from March 1998 to September 1998.

While working as a CSEA organizer, Suffin wore a CDU button and distributed CDU literature. During the time she worked on the contract campaign, Suffin testified, the issue of internal union politics sometimes was raised in discussions with employees. However, she never recruited CDU members or asked for donations for CDU during these organizing efforts.

After Suffin's union leave expired on June 30, 1995, she continued to engage in similar organizing activities on her own time. On March 31, 1998, CSEA requested a leave of absence from the State to permit Suffin to work on phase two of the contract campaign. However, as more fully discussed below, by that time CSEA had implemented the so-called lost timer agreement as a condition to hiring lost timers. Suffin elected not to sign the agreement because she claimed it would interfere with her protected conduct.

Another example of a lost timer is Reveles, a CSEA member and CDU activist who also is president of District Labor Council 781. As a CDU activist, Reveles attended CDU meetings and distributed the Union Spark (CDU's newsletter) at State work places and at CSEA meetings. She also assisted CDU in organizing a slate of candidates to advance CDU's reform movement.

Reveles testified that she engaged in no activities on behalf of CDU while she worked as a lost timer "other than what

would be protected activity, as if I wore a button or a T-shirt or something, that was it."

Meanwhile, an internal debate existed within CSEA about the authority of the CSEA general manager to hire employees. In an October 1, 1997, legal opinion, CSEA Attorney Howard Schwartz (Schwartz) advised then General Manager Jim Milbradt (Milbradt) that he had the exclusive authority to hire lost timers based on his review of CSEA's bylaws. The opinion concluded that:

> . . . whether it be by the General Manager directly, or his Division Administrator, or other designee, lost timers are brought on staff, assigned, directed, and can be terminated at the discretion of management.

Schwartz also advised that "lost timers should be advised, from the very outset, never to engage in Association politics. A statement prohibiting involvement should be developed."

Charging parties contend that the latter recommendation was a departure from the August 16, 1996 Zenz memo, cited above, which reminded lost timers that "involvement in Association politics during working hours is a misuse of Association money" and may be grounds for corrective action.

The CSEA board of directors, during its meeting on the weekend of October 5-6, 1997, confirmed Milbradt's hiring authority. Over Hard's objection, the board expressly gave Milbradt responsibility to hire members on lost time or union leave. In an October 10, 1997 memo, Milbradt informed all CSEA managers of the board's action and directed them to inform him of all new hires. Since Ramirez, Fox, and other lost timers had

been hired by Hard and Hackett, the board's directive effectively-switched authority to hire lost timers from Hard and Hackett to Milbradt.

Also on October 10, 1997, Milbradt terminated Fox and Ramirez as lost timers. Prior to their terminations, Fox and Ramirez had received no criticism of their work as lost timers. Complaints against them had not been investigated, and there was no attempt to discuss the terminations with Hard or Hackett. In fact, on the day Fox was terminated by CSEA, the union obtained an extension of Fox's leave of absence from the State through November 28, 1997. After the terminations, Hard arranged an alternative source of funding for their work and requested their reinstatement, but CSEA refused.

Milbradt, in his testimony, cited a number of reasons for the decision to terminate Fox and Ramirez. The lost timers were to report to area managers, he said, but they were not doing so. Milbradt said he had received numerous complaints from CSEA staff in Fresno and the Bay Area, as well as individuals in CSEA leadership positions about lost timers participating in internal union activities while being paid by CSEA. Based on these complaints, Milbradt concluded that the lost timers had violated CSD policy against participating in "Association politics."

Milbradt testified that he was concerned about lost timers doing work for CDU while being paid by CSEA. The complaints concerned participation in CDU activities at the May 14 rally at DPA, the June 27 rally at the State Capitol where an open debate

broke out between CSEA LRRs and CDU supporters, and the protest activities at the October 5 board of directors meeting. According to Milbradt, Fox and Ramirez were not the only lost timers terminated. He said there were other lost timers who were terminated for the same reasons, and he instructed Tut Tate not to rehire them unless they agreed to refrain from participating in internal union politics.

The definition of internal union politics applied by CSEA is not fixed in a bylaw or policy statement. Milbradt testified, however, that conduct related to "an internal union political group vying for political office within CSEA" would fall within the definition, as would conduct on behalf of CDU.

At the time Milbradt terminated Fox and Ramirez, CSEA was working on establishing uniform criteria for hiring lost timers. This resulted in development of the so-called lost timer agreement which is at issue in Case No. SA-CO-208-S.

In early 1998, CSEA implemented the lost timer agreement: Criteria for the Selection of Lost Timers. The new policy, implemented without discussion with Hard or Hackett, required employees to sign an agreement as a condition of becoming a lost timer.

The purpose of hiring lost timers, the agreement noted, is "exclusively to perform representation or organizing functions." While employed by CSEA in this capacity, lost timers were prohibited from engaging in political activity. The agreement stated:

> All lost timers shall refrain from engaging in the politics of the Association or its respective divisions/affiliates. Prohibited conduct includes, but is not limited to: (1) advocating for or against candidates for CSEA elective office; (2) rendering service in support or opposition to the election of any candidate for CSEA office; (3) participating in the governance activities of the Association or its divisions/affiliates, including, but not limited to, attending or participating in any Board or division/affiliate meetings or committee meetings without the written prior authorization from the General Manager or designee; and (4) advocating for or against the policies or positions of any member interest group which supports or endorses candidates for CSEA elective office.

The agreement includes other conditions that must be satisfied before an employee can become a lost timer. Employees must be able to return immediately to their positions with the State; they must report directly to an assigned CSEA manager; they may not be supervised by other CSEA members unless there is an explicit directive from the designated CSEA manager that such supervision is appropriate; and they may not be part of the CSEA bargaining unit represented by UAW. In accepting employment with CSEA, lost timers are required by the agreement to acknowledge that such employment is temporary, that CSEA may terminate them at any time, and that CSEA is not liable for any damages which may result from termination. Lastly, lost timers are required to agree in writing to be bound by the agreement, and that any breach of the agreement will result in termination.

In conjunction with the lost timer agreement, CSEA provides applicants with a form which allows lost timers to resign their

positions temporarily to engage in activities prohibited by the agreement. Upon completion of the particular activity, the lost timer is then reinstated to his or her position with CSEA. This type of temporary resignation is not new to CSEA. Its purpose, Milbradt testified, was to avoid conflicts resulting from lost timer involvement in these activities and to provide the information needed to monitor when lost timers were working for CSEA and when they were not. Temporary resignations originally were used to accommodate lost timers who wanted to engage in such activities during large blocks of time, such as weekends or evenings. CSEA has no set standards for approval or disapproval of a temporary resignation request. Milbradt testified such decisions are made on a case-by-case basis, and he said he could not imagine a request that he would deny. For example, if a lost timer requested temporary leave to distribute literature on his or her lunch hour, he would grant it without screening the literature. He also said that requests for temporary resignation to engage in the kind of political activities that form the basis of these consolidated charges would be approved. The purpose of the request, he reiterated, is to account for lost timers on CSEA's payroll when they are engaging in internal union activities that are not part of the duties they are expected to perform for CSEA.

CDU activists confronted with the lost timer agreement have refused to sign it because of its perceived restriction on their right to participate in union activity. Suffin, for example,

testified that she refused to sign the agreement for this reason, and she continues to participate in CDU activities on her own time rather than as a lost timer.

According to Hard, the requirement that members sign the lost timer agreement before they are permitted to work for CSEA has made it more difficult to engage in successful organizing campaigns on behalf of employees, particularly the campaign to secure collective bargaining agreements with the State.

Hard and Hackett are lost timers, but because they hold elective positions in the governance structure of CSEA, they have not been asked to sign the lost timer agreement.

## DISCUSSION

The Board must first determine in this case whether the charging parties in these consolidated cases were "employees" covered by the Dills Act when they served as lost timers. If so, it must then be determined if Ramirez and/or Fox were terminated from their CSEA positions in retaliation for participation in protected conduct, in violation of section 3519.5(b). Also, the Board must consider the allegation that the requirement that employees sign the lost timer agreement as a condition of employment by CSEA interfered with their right to engage in protected conduct and/or discriminated against CDU activists for their protected conduct in violation of section 3519.5(b).

Employee Status

Dills Act section 3513(c) defines "state employee" as "any civil service employee of the state." Since all of the charging parties were separated from State service at the time of the alleged unlawful conduct, due to either leave of absence or termination, CSEA argues that they do not fall within the definition of "state employee" in Dills Act section 3513(c). CSEA asserts that they do not meet the threshold jurisdictional standing requirements required for protection under the Dills Act.

In prior cases the Board has found individuals to be employees for the purpose of Dills Act coverage, even though they were in a category other than "active employee." In determining the meaning of the term "state employee" in such situations, PERB has looked to the California Constitution, Article VII, section 1, which states:

> The civil service includes every officer and employee of the State except as otherwise provided in this Constitution.

Article VII, section 4, lists several exemptions to this provision, none of which is relevant here. Thus, the Board, in State of California (Department of Corrections) (1997) PERB Decision No. 1224-S, states that:

> All personnel appointments other than the specific exempt appointments are therefore part of the civil service system and have some form of civil service status, whether it be seasonal, limited term, permanent, part-time, or any other type.

This reasoning has been followed in a long line of PERB cases. For example, in State of California (Department of Personnel Administration) (1985) PERB Decision No. 532-S, a rival union attempted to decertify CSEA as the exclusive representative of Unit 1. In evaluating the rival union's showing of support, PERB counted as employees certain individuals who occupied temporary intermittent and permanent intermittent classifications. Employees in these classifications were found to be eligible voters in the decertification election, even though they were not actively working for the State at the time the list was prepared. Similarly, in State of California (Department of Personnel Administration) (1990) PERB Decision No. 787-S, PERB rejected a unit modification petition that sought to exclude seasonal employees from civil service status. The Board found that the seasonal employees at issue were covered by the Dills Act and therefore dismissed the petition. (Id.; see also, State of California. Department of Personnel Administration (1991) PERB Decision No. 871-S, employees of California Conservation Corps covered by the Dills Act, even though they lacked traditional civil service attributes of permanent status and selection for employment by competitive examination.)

The civil service status of employees on leaves of absence, such as charging parties, is substantially greater than that of an intermittent or seasonal employee. Employees on approved leaves of absence from permanent civil service appointments have an absolute right to return to State employment upon the

expiration of their leaves. At the time of the alleged unlawful conduct, all of the charging parties, with the exception of Ramirez, were on approved leaves of absence.

CSEA advances a number of arguments based on Government Code provisions defining the term "employee." For example, CSEA argues that Section 18526 defines an employee as a person holding a position in State civil service, and Section 19996 defines an unpaid leave of absence as a temporary separation from civil service. Because none of the charging parties actively held a civil service position at the time of the alleged violation and were temporarily separated from their State positions, they cannot be considered part of the civil service, according to CSEA.

We do not find these and a host of similar Government Code sections cited by CSEA convincing. First, those employees who were on leave of absence from their civil service positions retained a mandatory reinstatement right to those positions. Second, interpreting the term "employee" in Dills Act section 3513(c) against constitutional provisions defining the term "civil service," PERB observed:

> Perspective is an important part of this process because although the statute and the Constitution must be read together and reconciled, each statutory scheme has its own purpose, and we must look to the purpose or the end intended. The question which we deal with in this case is not a question of benefits, wages and hours, or seniority under the civil service system. Rather, it is a question of coverage under the Dills Act. It is clear that the framers of the Dills Act intended a broad cross section of state

> employees to be covered. As long as the application of section 3513(c) does not run counter to the constitutional provisions regarding civil service, there is no conflict. . . . [State of California (Department of Personnel Administration), supra. PERB Decision No. 787-S, at p. 12.]

We conclude that employees on approved leaves of absence from civil service appointments retain their status as employees for the purpose of Dills Act coverage. Therefore, CSEA's argument that charging parties Hard, Hackett, Fox and Reveles were not employees covered by the Dills Act at the time of the alleged unlawful conduct is rejected.[4]

The status of Ramirez at the time of the alleged unlawful conduct at issue in Case No. SA-CO-200-S is different in that Ramirez was not on a leave of absence at that time. She had been terminated from her position as a State employee, allegedly in violation of the Dills Act, and her appeal was pending at the time of the formal hearing in this matter. Thus, unlike the other charging parties, she had no absolute right to return to a civil service position within State service. It is beyond dispute that Ramirez had the right under the Dills Act to challenge her termination as discriminatory because she was a State employee at the time of the allegedly unlawful conduct that formed the basis of her challenge. (California Union of Safety

[4]The Dills Act's provisions prohibit discrimination or interference by the State against employees for engaging in protected conduct. It is difficult to imagine that if this were a case in which it was alleged that lost timers had been discriminated against by the State for engaging in protected conduct, CSEA would challenge their status as employees under section 3513(c).

Employees (Trevisanut. et al.) (1993) PERB Decision No. 1029-S, at p. 9.) But Ramirez' charge involves conduct between an employee organization and its employee which occurred subsequent to the termination of that individual from State employment.

We are unaware of any case in which individuals in this status have been found to be employees for purposes of coverage by any collective bargaining statute.[5]

The Board concludes that Ramirez was not an employee under the Dills Act at the time CSEA allegedly discriminated against her because of her activities on behalf of CDU. Therefore she has no standing to file an unfair practice charge based on that conduct and Case No. SA-CO-200-S must be dismissed.

The Discrimination Allegations

In order to prevail on a claim of discrimination, charging parties must establish that they engaged in protected activity, that the activities were known to CSEA, and that CSEA took the retaliatory action because of such activity. (Novato Unified

[5]In cases decided under the National Labor Relations Act (NLRA) (29 U.S.C. sec. 141 et seq.), the National Labor Relations Board (NLRB) has held that a discharged employee who participated in picketing with another employee the day following his termination was not involved in protected activity because he was no longer an employee within the meaning of the NLRA. (NLRB v. Texas Natural Gasoline Corporation (1958) 253 F.2d 322 [41 LRRM 2708] (Texas Natural Gasoline).) And, in Polson Industries. Inc. (1079) 242 NLRB 1210 [101 LRRM 1344] (Poison). the NLRB held that a union activist who abruptly quit his job over a pay dispute was not entitled to a union representative during a meeting held the same day to discuss a request for reinstatement because he was not an employee within the meaning of the NLRA at the time he made the request. Unlike Ramirez' situation, these cases involved conduct between an individual and a former employer subject to the provisions of the NLRA.

School District (1982) PERB Decision No. 210 (Novato).) Unlawful motivation is essential to prevail on a retaliation claim. In the absence of direct evidence, an inference of unlawful motivation may be drawn from the record as a whole, as supported by circumstantial evidence. (Carlsbad Unified School District (1979) PERB Decision No. 89; Regents of the University of California (1998) PERB Decision No. 1263-H.) From Novato and a number of cases following it, any of a host of circumstances may justify an inference of unlawful motivation on the part of the respondent. (See e.g., Oakdale Union Elementary School District (1998) PERB Decision No. 1246, p. 15.) Once unlawful motive is established, the burden of proof shifts to the respondent to establish that it had a valid reason for its actions, regardless of the protected activities. (Novato.)

In Case No. SA-CO-203-S, Fox argues that her activities on behalf of CDU were protected participation in the activities of CSEA, that CSEA knew of her activities on behalf of CDU, and that CSEA terminated her appointment as a lost timer in retaliation for her conduct because CSEA wished to prevent lost timers from participating in such activities. CSEA's action, Fox contends, violated Dills Act section 3519.5(b).

In Case No. SA-CO-208-S, Hard, Hackett and Reveles argue that imposition of the lost timer agreement was itself a retaliatory act directed at the protected activity of the charging parties because it was adopted precisely to prevent internal union political activity in support of CDU. Charging

parties assert, therefore, that CSEA has violated Dills Act section 3519.5(b).

The threshold issue presented by these allegations is whether charging parties Fox, Hard, Hackett and Reveles were engaged in activities which are protected by the Dills Act at the time of the disputed conduct in these cases. Specifically, the Board must determine whether the Dills Act protects the type of internal union activity which forms the basis of the disputes presented here.

State employees have the right to participate in the activities of employee organizations for the purpose of representation on matters of employer-employee relations (Dills Act sec. 3515). However, the Board has not interpreted the Dills Act as protecting all participation in employee organization activities, or as providing PERB with unlimited authority to review the internal affairs of employee organizations. In Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106 (Kimmett), the Board examined the identical right provided under the Educational Employment Relations Act (EERA)[6] to determine if employees have any protected right "to

[6]EERA is codified at Government Code section 3540 et seq. Dills Act section 3515 and EERA section 3543 contain the following identical language concerning employee rights:

> Employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

have an employee organization structured or operated in any-particular way." The Board stated that:

> The EERA gives employees the right to 'join and participate in the activities of employee organizations' (sec. 3543) and employee organizations are prevented from interfering with employees because of the exercise of their rights (sec. 3543.6(b)). Read broadly, these sections could be construed as prohibiting any employee organization conduct which would prevent or limit employee's participation in any of its activities. The internal organization structure could be scrutinized as could the conduct of elections for union officers to ensure conformance with an idealized participatory standard. However laudable such a result might be, the Board finds . . . intervention in union affairs to be beyond the legislative intent in enacting the EERA. . . . The EERA does not describe the internal workings or structure of employee organizations nor does it define the internal rights of organization members. We cannot believe that by the use of the phrase 'participate in the activities of employee organizations . . . for the purpose of representation on all matters of employer-employee relations' in section 3543. the legislature intended this Board to create a regulatory set of standards governing the solely internal relationship between a union and its members. [Kimmett at pp. 15-16; emphasis added.]

In Kimmett, therefore, the Board concluded that under the Dills Act employees have no protected rights in the organization of their exclusive representative unless the internal activities of the employee organization have a substantial impact on the employees' relationship with their employer.

In numerous later cases, the Board applied the Kimmett limitation and refused to intervene in matters involving the solely internal activities or relationships of an employee

organization which do not impact employer-employee relations. For example, in California State Employees Association (Hackett, et al.) (1993) PERB Decision No. 979-S, the Board dismissed a charge in which there was no showing that the disputed internal activities of the employee organization impacted the employment relationship. In rejecting a request for reconsideration of that decision, the Board specifically referred to a portion of the charge challenging internal procedures of the employee organization as "an area into which the Board will not intervene except where the internal activities of the employee organization have a substantial impact upon employees' relationships with their employer." (California State Employees Association (Hackett, et al.) (1993) PERB Decision No. 979a-S at p. 3, fn. 3.)

Similarly, in California State Employees Association (Hackett) (1993) PERB Decision No. 1012-S, the Board dismissed charges involving the union's internal contract ratification process because it had not been demonstrated that the internal activities substantially impacted the relationship of employees to the employer. (See also, California State Employees Association (Garcia) (1993) PERB Decision No. 1014-S, in which the Board dismissed charges relating to alleged union election irregularities and union discipline procedures because there was no showing of a substantial impact on the charging party's relationship with her employer.)

In other cases, the Board has intervened in the internal affairs of a union when alleged retaliation against members for their union participation went beyond solely internal union activities and impacted the employment relationship. In California Union of Safety Employees (Coelho) (1994) PERB Decision No. 1032-S, the Board found a violation in the union's retaliatory filing with the employer of a citizen's complaint against an employee, and in its subsequent refusal to represent the employee in the resulting investigation conducted by the employer. The Board found that the union's conduct was reviewable because it directly impacted the employee's relationship with his employer and went beyond the solely internal relationship of the employee and union. Likewise, in California Union of Safety Employees (John) (1994) PERB Decision No. 1064-S, the Board found a violation in the union's retaliatory refusal to provide representation to a member in his appeal to the State Personnel Board of the employer's adverse action against him. Again, actions beyond the solely internal relationship of the employee and the union were involved.

However, in California State Employees Association (Hackett, et al.) (1995) PERB Decision No. 1126-S (Hackett, et al.), the Board departed from this policy and found a violation based on solely internal union conduct which was not shown to impact the employment relationship. Subsequently, the Board reaffirmed its longstanding Kimmett policy in (California State Employees Association Hutchinson) (1998) PERB Decision No. 1304-S

(Hutchinson). In Hutchinson, the Board dismissed a charge in which the allegations involved the solely internal operations of the union and the internal relationships between the union and its members. The allegations did not involve conduct which impacted the employment relationship.[7] The Board held that this solely internal union activity is not protected by the Dills Act, and is not subject to intervention or regulation by PERB:

> Pursuant to Kimmett, the statutes administered by PERB provide employees with no protected rights in the organization or operation of their exclusive representative unless the internal activities of the employee organization have a substantial impact on the employees' relationship with their employer. [Hutchinson at p. 4.]

From a review of these cases, it is clear that the Dills Act does not protect the solely internal union participation and activities of employees which do not impact employer-employee relations.[8] Valid policy considerations support limiting the

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[7]The charging parties in Hutchinson accused CSEA of violating the Dills Act in numerous ways, including allegations that it permitted CDU supporters to campaign to alter CSEA's internal structure; that it permitted the abuse and coercion of members who do not support CDU; that it spent CSEA resources on an organizing campaign which failed to result in a collective bargaining agreement; and that it allowed its Civil Service Division officers to use internal processes fraudulently.

[8]The Board also retains the authority to assess the reasonableness of a union's membership restrictions pursuant to Dills Act section 3515.5. That section provides, in part:

> Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

Board's scope of review in this manner. PERB's function is to interpret and administer the statutes which govern the employer-employee relationship, not to police internal relationships among various factions within employee organizations. Remedies sought for disputes arising from internal union disputes are more appropriately presented in a different forum.

To clarify the Board's policy, we expressly reaffirm the holding in Hutchinson; i.e., the Dills Act does not protect solely internal union participation and activities of employees which do not impact employer-employee relations. The burden of proof is on the charging party to demonstrate the existence of such an impact. Consequently, to the extent that any language in Hackett. et al. or other Board decisions, including but not limited to United Teachers of Los Angeles (Seliga) (1998) PERB Decision No. 1289 and California State Employees Association (O'Connell) (1989) PERB Decision No. 753-H, can be read as an exception to this policy, those cases are hereby overruled.

Applying these rules to the case at bar, the threshold issue is whether the charging parties have demonstrated that the internal union activities at issue had a substantial impact on employer-employee relations. If so, their participation in those internal union activities was protected by the Dills Act.

Fox was terminated by CSEA as a lost timer in October 1997. During her tenure as a lost timer, she participated in numerous

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(See, e.g., California School Employees Association and its Shasta College Chapter #381 (Parisot) (1983) PERB Decision No. 280.)

events that involved CDU. However, Fox has failed to demonstrate that her participation in CDU events impacted employer-employee relations. The Board concludes that Fox was not engaged in protected activity at the time of the disputed conduct, and the unfair practice charge and complaint in Case No. SA-CO-203-S must be dismissed.

Similarly, Hard and Hackett are State employees on leave of absence from their State positions, serving as full time union activists. Hard and Hackett have also failed to present evidence of any impact on employer-employee relations associated with the internal CSEA activity which forms the basis of this dispute. Because they have not met their burden of proof, we conclude that their conduct was unprotected. Accordingly, we also dismiss Hard and Hackett's allegations.

Our analysis for Reveles is similar. She testified that while she worked for CSEA as a lost timer, she did not engage in activities on behalf of CDU other than wearing a CDU button or T-shirt. The record reveals that Reveles is an active CDU participant. However, she has not presented evidence that any of her internal union activities had a substantial impact on employer-employee relations. Therefore, that conduct was not protected by the Dills Act, and the unfair practice charge and complaint in Case No. SA-CO-208-S must be dismissed.

We conclude that in Case No. SA-CO-208-S, none of the three charging parties (Hard, Hackett or Reveles) has demonstrated that they were engaged in protected activity, as is required by the

first element of the Board's Novato test. The charging parties' allegations involve the solely internal operations of CSEA and the internal relationships between CSEA and its members. This solely internal union activity is not protected by the Dills Act, and is not subject to intervention or regulation by PERB. Our rationale for the dismissal makes it unnecessary to discuss the remaining elements of the Novato test or CSEA's defenses. The discrimination allegations in this charge are dismissed.[9]

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record herein, the complaints and underlying unfair practice charges in Case No. SA-CO-200-S, Lydia Ramirez v. California State Employees Association; Case No. SA-CO-203-S, Joyce Fox v. California State Employees Association; and Case No. SA-CO-208-S, Jim Hard, Cathy Hackett and Irma Reveles v. California State Employees Association, are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Dyer joined in this Decision.

[9]Charging parties also argue that the lost timer agreement interfered with rights protected by Dills Act section 3519.5(b). To prevail on this theory, charging parties must first show that CSEA's conduct interfered with or tended to interfere with the exercise of protected activities. Based on our rationale for dismissing the discrimination allegations, the interference allegations are hereby dismissed for the same reason.